

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  QWEST CORPORATION	DOCKET NO. INU-03-4 (WRU-03-61)
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**ORDER GRANTING MOTION TO WITHDRAW AND  
TERMINATING DOCKET**

(Issued January 16, 2004)

On July 2, 2003, Qwest Corporation (Qwest) filed a petition asking the Utilities Board (Board) to determine that retail services and facilities offered by Qwest in 37 exchanges have become subject to effective competition such that these services and facilities should be deregulated pursuant to Iowa Code § 476.1D (2003).

In an order dated August 7, 2003, the Board described the criteria to be used in determining whether a service is subject to effective competition, pursuant to 199 IAC 5.6(1). At that time, the Board found that the petition did not provide sufficient data to support a *prima facie* finding of effective competition.

On August 15, 2003, Qwest filed a "Supplement to Petition" consisting of a listing and rates of the retail local exchange offerings of services and facilities. Qwest noted that its supplemental filing was "obtained from tariffs on file with, and approved by, this Board."

On September 28, 2003, the Board issued an order docketing the petition and initiating a formal notice and comment proceeding. On November 14, 2003, initial

statements of position were filed by the Consumer Advocate Division of the Department of Justice (Consumer Advocate); the cities of Arnolds Park, Spirit Lake, Wahpeton, and Okoboji, Iowa (collectively, the Municipals); the Iowa Telecommunications Association (ITA); Worldcom, Inc., d/b/a MCI (MCI); and Qwest.

On December 15, 2003, Qwest, Consumer Advocate, and MCI filed counter-statements of position.

On December 18, 2003, Qwest filed a "Motion for Withdrawal of Petition for Deregulation." Qwest asserts that since the July 2, 2003, filing date, there are additional competitive threats in all of Qwest's exchanges. Since Qwest believes the industry has changed since its original filing, Qwest prefers to pursue a different process for deregulation. Qwest asserts that the existing deregulation process is outdated and takes too much time to keep up with changes in markets and technologies. Therefore, Qwest thinks legislative action must be pursued.

On December 23, 2003, Consumer Advocate filed a "Resistance" to Qwest's motion to withdraw. Consumer Advocate asserts that Qwest's withdrawal conflicts with the applicable law. Pursuant to Iowa Code § 476.1D, the Board has an obligation to deregulate services that are found to be subject to effective competition. Consumer Advocate believes that Qwest's allegations in its motion do not justify Qwest's request that the Board discontinue this effort to administer Iowa law. Consumer Advocate goes on to say that the Legislature has prescribed public policy

and assigned the Board to promote and enforce that policy, regardless of Qwest's desire to transfer its case from the agency to the Legislature.

On January 2, 2004, MCI filed a "Resistance to Motion for Termination of Docket; Motion to Strike; and Motion for Summary Decision." MCI states that the Board has discretionary power pursuant to 199 IAC 5.3(1) to conduct this deregulation proceeding on its own motion, that is, without a petition or petitioner. In addition, the Board has discretion to decide whether to conduct evidentiary hearings in this proceeding. MCI also asserts that the purpose of this docket is to determine whether retail services and facilities of *all* regulation providers – not just Qwest – should be deregulated in the 37 identified exchanges. Therefore, MCI claims that Qwest is not in the position to decide unilaterally whether this proceeding should or should not continue.

MCI requests that the Board deny Qwest's motion to terminate further proceedings, but does not oppose Qwest's motion to withdraw its petition unless the Board is unwilling to proceed with this docket in the absence of a Qwest deregulation petition. In that case, MCI asks that the Board deny Qwest's motion to withdraw.

In addition, MCI points out that considerable effort, time, and money has been invested by the active parties to this docket and termination will prejudice those parties. Termination would also be inconsistent with the Board's findings in its September 26, 2003, docketing order that the "issues raised in Qwest's petition are important" and should be considered "without further delay."

MCI claims that Qwest's argument that the level of competition has dramatically changed since the original petition was filed is both specious and disingenuous. Given that, according to Qwest's petition, the level of competition Qwest faced was "effective competition" and that "effective competition" is sufficient under current law to warrant deregulation, it is difficult to understand how any alleged increase in competition would warrant abandonment of the deregulation process already available under current law.

MCI also filed a "Motion to Strike," which requests the Board strike all statements of alleged extra-record fact in paragraphs 5 – 14 in Qwest's motion to withdraw, as the information does not appear in the record and is not supported by affidavit.

Finally, in its "Motion for Summary Decision," MCI requests that the Board immediately issue a summary decision finding and determining that the 37 local exchanges identified in Qwest's petition are not subject to effective competition. MCI asserts that no party has submitted any probative evidence demonstrating the market forces in those exchanges are sufficient to ensure just and reasonable rates without regulation. According to MCI, the Board can exercise its discretion to issue the summary decision requested by MCI without an oral presentation because this docket is not a contested case proceeding where an evidentiary hearing is required. The Board's rules in 199 IAC chapter 5 allow the Board in its discretion to decide "at any time" whether to conduct an evidentiary hearing.

On January 6, 2004, Qwest filed a response to Consumer Advocate and MCI. In response to Consumer Advocate, Qwest says that section 476.1D has no language that would suggest Qwest cannot withdraw its own petition.

In addressing MCI's resistance to Qwest's withdrawal, Qwest agrees that the Board has the power to initiate a formal notice and comment proceeding on its own motion. However, Qwest points out that the Board did not initiate this proceeding but did so upon the petition of Qwest. If the Consumer Advocate or MCI are concerned that the Board is regulating services that are subject to effective competition, the proper remedy, according to Qwest, is for those parties to file their own petition for deregulation with the Board.

Furthermore, according to Qwest, this proceeding is addressed only to deregulation of Qwest's services and not to the services of any other entity. Qwest points out that, under the definition in section 476.96(5), there are no other rate-regulated providers of retail local exchange service in the 37 exchanges.

Qwest maintains that its request for withdrawal is no different than if a complaint were filed in civil court and later withdrawn by the complainant. There is no prohibition against voluntary dismissal of a petition by the party that filed the petition.

Qwest claims that MCI misunderstands the basis for Qwest's withdrawal request when it discusses the difficulty in understanding how an alleged increase in competition would call for abandoning the deregulation process already available.

Qwest believes the current process is “cumbersome, burdensome, time-consuming, and outmoded” by changes in the telecommunications market.

In response to MCI's motion to strike, Qwest asserts that the statements referenced by MCI were not offered as evidence, but merely to explain why Qwest is withdrawing its petition.

Lastly, Qwest claims MCI's motion for summary decision is unclear with respect to the question of whether Qwest has submitted “probative evidence” on the issue of sufficient market forces to ensure just and reasonable rates absent regulation. According to Qwest, the Board's finding that Qwest's initial filing did not constitute a “*prima facie*” case has been superseded by the filing of the statements of position. If it is MCI's position that the Board could not make a determination of effective competition unless some other party agreed with Qwest, Qwest concludes that position is without merit.

The Board will grant Qwest's motion to withdraw its petition and terminate this docket. It is true that the Board can initiate a deregulation docket on its own motion and the Board could use that authority to continue this docket without Qwest's petition or even Qwest's participation, but the reality is that Qwest is the only party in this docket that takes the position that local exchange service in the 37 identified exchanges is subject to effective competition. Each of the other parties is opposed to Qwest's petition. As a practical matter, this makes it unlikely that an adequate record can be developed in this docket, and in the existing time frames, without a substantial

expenditure of Board resources. This would not be an efficient or reasonable way of approaching this important issue.

This does not mean that the Board is unaware of, or ignoring, its statutory duties relating to deregulation. Iowa Code § 476.1D and the Board's rules in 199 IAC chapter 5 allow the Board to initiate a deregulation proceeding on its own motion, if the Board believes that to be an appropriate course of action. The Board is in the process of finalizing its first survey of the status of local exchange competition in Iowa. The survey results may support the initiation of a proceeding to consider deregulation of one or more telecommunications services or facilities. If so, the Board will initiate such a proceeding.

The Board will deny MCI's motion to strike as moot. The Board's decision to grant Qwest's motion to withdraw is not based on any of the disputed information, so the inclusion of the information in the agency record is, at worst, harmless surplus.

The Board will also deny MCI's motion for summary decision. The record in this docket is substantially incomplete and therefore does not provide a reasonable basis for a decision on the merits.

**IT IS THEREFORE ORDERED:**

1. The "Motion for Withdrawal of Petition for Deregulation" filed by Qwest on December 18, 2003, is granted.
2. The oral presentation in this docket, scheduled for January 21, 2004, is canceled.

3. The "Motion to Strike" and "Motion for Summary Decision" filed by MCI on January 2, 2004, are denied.

4. Docket No. INU-03-4 is terminated.

**UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 16<sup>th</sup> day of January, 2004.